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IN THE

Supreme Court of the United States

TC HEARTLAND LLC,

Petitioner,

v.

KRAFT FOODS GROUP BRANDS LLC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR *AMICUS CURIAE* ACT | THE APP ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

ACT | The App Association is an international grassroots advocacy and education organization representing more than 5,000 small software application developers and information technology firms and is the only organization focused on the needs of small business innovators from around the world. The App Association advocates for an environment that inspires and rewards innovation while providing resources to help its members leverage their intellectual assets to raise capital, create jobs, and continue to grow.

In light of the critical role that venue plays in patent litigation, the App Association has a keen interest in the proper functioning of the U.S. patent system. Our members include companies who have faced, and continue to face, suits for patent infringement in particular federal districts that may be thousands of miles away from their headquarters due to claims that products at issue enter the stream of commerce in such districts simply by virtue of them being available over the internet. The potential to be sued anywhere at the option of an unknown party under 28 U.S.C. § 1400(b) carries with it the potential of surprise and substantial costs, which can often spell the death of these small businesses. The App Association is deeply invested in ensuring that its members and the

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1. Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus and its counsel made a monetary contribution to its preparation or submission. Petitioner filed a blanket consent in this appeal on October 3, 2016, and respondent provided its consent to the filing of this brief via email dated January 18, 2017. The latter has been filed with the Clerk's office.

app economy can grow and create American jobs with confidence in the legal system's approach patent cases.

SUMMARY OF ARGUMENT

ACT | The App Association (the App Association) members include companies who have faced, and continue to face, suits for patent infringement in particular federal districts that may be thousands of miles away from their headquarters due to claims that products at issue enter the stream of commerce in such districts simply by virtue of them being available over the internet. The potential to be sued anywhere at the option of an unknown party under 28 U.S.C. § 1400(b) carries with it the potential of surprise and substantial costs, which can often spell the death of these small businesses. From this perspective, the App Association writes in support of the Petitioner's brief.

The small business software industry is the driving force behind the extraordinary growth in internet-related devices (*e.g.*, smartphones, tablets, etc.) that has revolutionized the way that Americans work and play. Underlying the growth and ingenuity of this sector and its related benefits are intellectual property rights, including patents, and the need for a coherent legal framework for intellectual property disputes. Duplicitous efforts by patent litigants to "forum shop" are increasingly undercutting this needed certainty. Further, as a result of "forum selling" – efforts by district courts to attract patent litigants who have the ability to file in essentially any district in the United States – litigants find "forum shopping" (in particular, choosing to surprise a defendant by suing in a district other than where the defendant is headquartered) easier than ever.

The App Association contends that the Federal Circuit's interpretation of section 1400(b) runs contrary to congressional intent and this Court's case law. If this Court adopts the lower court's rogue interpretation, selective "forum shopping" practices that undermine confidence in the patent litigation system will be encouraged more than ever before. To combat this effect and restore confidence in the system, this Court must hold consistent with its original and more appropriate interpretation of 1400(b) as established by *Fourco Glass Co.v. Transmirra Products Corp.* Confirming *Fourco* will provide much-needed predictability in the patent system the nascent app economy needs by correcting the flawed approach taken by the Federal Circuit's analysis.

In its interpretation of section 1400(b), the Federal Circuit's decision disregards *Fourco* and creates – in effect – a "universal" approach to patent venue that will effectively allow an accused patent infringer to be haled into any court regardless of its connections to that court's district. We urge this Court to agree that the Federal Circuit improperly held that *Fourco* no longer controls a patent venue determination because the 1988 change to 1391(c) required the Federal Circuit to reexamine the interplay of Section 1391(c) and Section 1400(b) "as a matter of first impression." Additionally, to hold that contention, the Federal Circuit's decision erroneously relies on congressional reports that do not support its reasoning that the holding in *VE Holding* is the appropriate interpretation; however, the congressional reports to which the Federal Circuit refers, and goes as far as to cite in the case at bar, reference *VE Holding* as the justification for amending Section 1400(b) to ameliorate the harms derived from that decision's rogue interpretation. Even

further, the Federal Circuit's decision contradicts well-established precedent concerning statutory construction and interpretation to get to its result.

We urge the Court to reverse the Federal Circuit's decision, consistent with the arguments discussed below.

ARGUMENT

I. PATENTS – AND PREDICTABILITY IN THE FUNCTIONING OF THE PATENT SYSTEM – ARE VITAL TO THE NASCENT APP ECONOMY'S CONTINUED GROWTH

In its relatively short existence, the software application (app) industry has served as the driving force in the rise of smartphones, tablets, and other internet-connected devices and markets. The rise of the app economy has revolutionized the software industry, touching every sector of the economy in every United States (U.S.) federal district. ACT | The App Association, *State of the App Economy 2016* (Jan. 2016), http://actonline.org/state-of-the-app-economy-2016/. Today, the app economy is a $120 billion ecosystem that is led by U.S. companies, of which over eighty percent are startups or small businesses. *Id.* As decreasing operational costs through the use of global computing resources, such as cloud-based services, have enabled a diversity of novel, patentable inventions, as well as innovative business models, hundreds of millions of Americans – and billions of people around the world – use apps in every facet of their lives, from education to finance to leisure activities and beyond.

Assuming a coherent legal framework for intellectual property disputes, the growth of this vital ecosystem is expected to continue: downloads in app stores in 2016 are projected to grow to $147.3 billion and by 2020 to reach $284.3 billion. D an Takahashi, *The App Economy Could Double to $101 Billion by 2020, Venture Beat* (Feb. 10, 2016), http://venturebeat.com/2016/02/10/the-app-economy-could-double-to-101b-by-2020-research-firm-says/. Already, data from 2016 demonstrates that the app economy's exponential growth continues. Dean Takahashi, *App Annie: Worldwide app downloads grew 15% and revenue soared 40% in 2016* (Jan. 17, 2017), http://venturebeat.com/2017/01/17/app-annie-worldwide-app-downloads-grew-15-and-revenue-soared-40-in-2016/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+venturebeat%2FSZYF+%28VentureBeat%29.

Intellectual property rights, including patents, provide the foundation for the growth and ingenuity of this society-altering economy. Patents allow small business innovators to protect the investment they make in innovation, attract venture capital, establish and maintain a competitive position in the marketplace, and level the playing field in dealings with established companies and competitors. Small businesses produced sixteen times more patents per employee than large patenting firms. An Analysis of Small Business Patents by Industry and Firm Size, http://archive.sba.gov/advo/research/rs335tot.pdf; Innovation in Small Businesses: Drivers of Change and Value Use www.sba.gov/sites/default/files/rs342tot_0.pdf.

The app-powered ecosystem's success, reliant on continued innovation and investment in connected devices and interfaces, will hinge on the sufficiency of the legal

frameworks that underlie them. Small business innovators highly value patents and seek to rely on the ability to protect their rights (whether in licensing or in litigation) within a predictable environment on which to base their decisions. As more and more devices throughout the consumer and enterprise spheres become connected to the internet – a phenomena commonly referred to as the Internet of Things – apps will likely remain the interface for communicating with these devices. Morgan Reed, Comments of ACT | The App Association to the National Telecommunications and Information Administration regarding The Benefits, Challenges, and Potential Roles for the Government in Fostering the Advancement of the Internet of Things, ACT | The App Association (June 2, 2016), http://actonline.org/wp-content/uploads/NTIA-Comments-on-IoT-Regulations.pdf.

Small business viability is directly correlated to the predictability of the judicial system when defending from patent infringement allegations, and duplicitous efforts by patent litigants to "forum shop" undercut this needed certainty. While large multi-national corporations can typically withstand the delays and expenses associated with being barraged by patent infringement lawsuits, the stakes could not be higher for small businesses. Small businesses in the high tech industry often find themselves accused of patent infringement in a district court far away from their place of business, and the App Association's members are no exception, often facing suits for alleged infringement in the most popular patent venues in the United States despite having no realistic connection to such districts. The vast majority of these small businesses have been "litigated to death," or forced to settle and sign non-disclosure agreements that prevent

them from sharing their experiences, though on their behalf the App Association can say with great certainty that, under the existing patent litigation system, even the prospect of facing one or more patent infringement trials as part of a litigation strategy, particularly in a remote or unexpected venue, can represent an "end of life" event. *E.g.*, Laura Lorek, Silicon Hills, *Patent Trolls Threaten to Bankrupt Companies and Stifle Innovation*, (May 30, 2013) http://www.siliconhillsnews.com/2013/05/30/patent-trolls-threaten-to-bankrupt-companies-and-stifle-innovation/ (noting one company estimating that ninety percent of its litigation costs are spent defending patent infringement allegations); see also https://static.newamerica.org/attachments/3894-patent-assertion-and-startup-innovation/Patent%20Assertion%20and%20Startup%20Innovation_updated.62ca39039688474e9a588fc7019b0dde.pdf (describing venue-shopping as a systemic and repeated issue for successful startups).

As a result of "forum selling" – efforts by district courts to attract patent litigants who have the ability to file in essentially any district in the United States – litigants find "forum shopping" (in particular, choosing to surprise a defendant by suing in a district other than where the defendant is headquartered) easier than ever. *See* Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. Cal. L. Rev. 241 (2016); J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. Pa. L. Rev. 631 (2015). While the App Association estimates that less than four percent of its membership is headquartered in the Eastern District of Texas, our members are constantly being haled into this court. Further, empirical analysis has demonstrated that two districts – the Eastern District of Texas and the District of Delaware – have emerged as clear "forum

selling" winners that increasingly attract "forum shoppers." *See* Anderson, *supra*, 163 U. Pa. L. Rev. at 632-33. For example, as recently as 2015, approximately fifty percent of all defendants named in patent infringement suits were in cases in the Eastern District of Texas, *see* GAO Report, *Patent Office Should Define Quality, Reassess Incentives and Improve Clarity*, 16 (June 2016), because it has created unique advantages to those who choose to initiate patent infringement suits in its court in areas including discovery deadlines, venue transfer decision processes, and claim construction requirements. *See* J. Jonas Anderson, Court Competition for Patent Cases, 163 U. PA. L. REV. 631 (2015); Daniel M. Klerman & Greg Reilly, Forum Selling, 89 S. CAL. L. REV. 241 (2016) (discussing phenomenon of "forum selling" in the Eastern District of Texas, including the indirect financial benefits of patent litigation for the local economy.). The use case of the Eastern District of Texas demonstrates (with data) that the federal court system's current approach to venue in patent litigation has provided a predictable advantage for patent litigation initiators. Brian J. Love & James C. Yoon, *Predictably Expensive: A Critical Look at Patent Litigation in the Eastern District of Texas, Stan. Tech. L. Rev.* ___ (forthcoming, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2835799.

Due to the nature of the internet-enabled app economy and the very characteristics of the patent litigation system at issue before the Court, the App Association's small business members must now grapple with the possibility that they can be sued for patent infringement in any federal district court. The App Association believes that lawsuits are sometimes appropriate to resolve legitimate controversies and accepts that patent infringement

accusations are inevitable, but defendants must be able to face accusers in an appropriate venue.

As discussed below, the Federal Circuit's current approach to venue in the context of patent suits is akin to "universal venue," where any plaintiff may assert proper venue regardless of any connection of the defendant and/or controversy to that court. *See supra* at 11-13. Based on the experiences of our members, the App Association believes that such an approach harms the App Association's small business members through exposure to the high costs associated with litigating in districts in which they have little or no connection. And beyond the financial costs associated with such suits, these abusive practices undermine public confidence in the patent system – and the rule of law as a whole – in the United States.

II. THE FEDERAL CIRCUIT'S INTERPRETATION IS NOT CONSISTENT WITH CONGRESSIONAL INTENT OR THIS COURT'S CASE LAW

A. The Federal Circuit's Decision Disregards Fourco and Creates – In Effect – a "Universal" Approach to Patent Venue

Section 1400(b), enacted in 1948, clearly states "[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." 28 U.S.C. § 1400(b) (2016). Up until 1988, patent venue had long enjoyed a clear and consistent judicial approach favoring a "plain meaning" analysis of this statute. *See Fourco Glass Co.v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957).

Additionally, Section 1400(b) held exclusive dominion over patent litigation, unencumbered by Section 1391(c), titled "Venue generally," which describes corporate residence as "any judicial district in which it is ... licensed to do business or is doing business." 28 U.S.C. § 1391(c)(2). In *Fourco*, this Court held that Section 1400(b) "is the sole and exclusive provision controlling venue in patent infringement actions, and...is not to be supplemented by the provisions of 28 U.S.C. § 1391(c)." *See Fourco Glass Co*, 353 U.S. at 228. In addition, this Court in *Fourco* strongly favored the plain meaning construction of the venue statute. *See Fourco*, 353 U.S. at 228.

In 1988, Congress amended section 1391(c) by adding the prefatory clause "For the purposes of venue" to its first sentence. *See* 28 U.S.C. § 1391(c) (2016). Sometime after the 1988 amendment, patent holders started to question the effect this had on 1400(b). However, in 1989, one district court quickly dismissed the implication by holding "the recent amendment to § 1391(c) in no way indicates that an alteration was intended in the operation of § 1400(b)." *Doelcher Prods., Inc. v. Hydrofoil Int'l, Inc.*m 735 F. Supp. 666. 668 (D. Md. 1989). The court went on to say that nothing in legislative history of section 1391(c) suggests that Congress intended any effect on section 1400(b), favoring the plain meaning of the statute. *See id.*

The Federal Circuit has deviated from this longstanding interpretation in holding that *Fourco* no longer controls a patent venue determination because the 1988 change to 1391(c) required the Federal Circuit to reexamine the interplay of Section 1391(c) and Section 1400(b) "as a matter of first impression." *See VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1579

(Fed. Cir. 1990). The Federal Circuit went on to hold that that *Fourco* had been indirectly overruled and that the new 1391(c) both significantly enlarged Section 1400(b) to permit any defendant to be haled into court should any portion of the allegedly infringing activity occur within that district, despite a lack of any direct intent from Congress in the 1998 section 1391(c) reflecting anything like this. The Federal Circuit's deviation cannot be squared with *Fourco*.

The "forum shopping" discussed above has resulted from the Federal Circuit's adoption of a rule that essentially boils down to "universal venue." "Universal jurisdiction" generally describes a court asserting jurisdiction over particular controversies with complete disregard to that court's connection to the controversy. See http://www.harvardilj.org/wp-content/uploads/2011/04/HILJ_45-1_Kontorovich2.pdf. Traditionally, "universal jurisdiction" was used to address the crime of piracy on the seas. *See United States v. Layton*, 509 F. Supp. 212, 223 (N.D. Cal. 1981). Recently, its use has occurred in a number of foreign courts to confront alleged human rights offenses. See Comm. on Int'l Human Rights Law & Practice, Int'l L. Ass'n, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, at 26–28 (2000). While it is a term generally used in the context of international jurisdiction, "universal jurisdiction" provides a helpful analogy (particularly when considering established intent underlying the jurisdiction) to the dangers presented by the patent venue precedent the Federal Circuit's decision would create if endorsed by this Court. In an internet-enabled U.S. economy that allows global commerce in an instant at the touch of an app, upholding the Federal Circuit's decision would, in effect,

expose alleged patent infringers subject to "universal venue" within the U.S. federal court system – but without the necessary agreement preceding its creation or any indication of intent.

The App Association's members would be left wondering in which court they could *not* be sued for alleged patent infringement. For these small businesses, 1391(c) personal jurisdiction would make venue appropriate in every district court in the United States. Such an environment will encourage abusers of the patent system that this Court has noted it seeks to discourage, such as patent assertion entities (PAEs) to file frivolous patent lawsuits. *E.g.*, *Overstock.com, Inc. v. Furnace Brook, LLC*, 420 F.Supp.2d 1217 (2005) (concerning an internet merchant that sought declaration arguing that it was not infringing a patent for software that facilitated internet purchases. Patentee moved to dismiss for lack of personal jurisdiction.).

Worse, if upheld, the Federal Circuit's new precedent will directly contribute to creating new avenues for "forum shoppers" (such as PAEs and non-practicing entities [NPEs]) seeking to enjoy the option to file suit against alleged infringers in – effectively – any federal district court in the United States. Not only is this outcome bad public policy that undermines confidence in the American court system at large (and for patent controversies particularly), but such a change in the context of patent controversy venue would also constitute a foundational shift to the U.S. patent system as a whole.

The App Association believes such a change should only be made pursuant to the clear and express intent of Congress. In the case at bar, there is virtually nothing in the legislative history regarding amendments to 1391(c) or 1400(b) suggesting that Congress intended Section 1391(c) to influence the content within Section 1400(b). However, the Federal Circuit has taken it upon itself to speak for Congress where Congress has remained silent. Based on its ruling on this matter and the ruling in *VE Holding*, it has taken the legislative role out of Congress's hands by rewriting statutes. *See generally, In re TC Heartland*, No. 2016-105 (Fed. Cir. Apr. 29, 2016); *see also VE Holding*, 917 F.2d 1574. We urge this Court to agree that "[i]t is for Congress to determine if the present system of design and utility patents is ineffectual." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 167-168 (1989).

B. The Federal Circuit Decision Erroneously Relies on Congressional Reports that do not Support its Reasoning

As its legal basis for this deviation, the Federal Circuit relied on the holding in *VE Holdings Corp. In re TC Heartland*, No. 2016-105, at 1341-42 (Fed. Cir. Apr. 29, 2016), stating that the relevant legislative history actually supports its assertion. *See id.* at 1343 (writing "Congressional reports repeatedly recognized *VE Holding* as the prevailing law."). However, Congress did not actually endorse this idea in any part of its record, but merely recognized that there is an anomalous opinion on the Federal Circuit level that it needs to cure. In 2015, the House Judiciary Committee cited in the Federal Circuit's ruling stated that "U.S. Court of Appeals for the Federal Circuit "reinterpreted" [Section 1400(b)] in a way that

robbed it of all effect [emphasis added]." H.R. Rep. 114-235. That same report went on to state, "Congress must correct the Federal Circuit's mistake, and clarify that patent lawsuits may only be brought in districts with some reasonable connection to the dispute." *See id.*

Despite this congressional record, the Federal Circuit in *VE Holdings* goes as far as to say "[t]hat there may be no specific legislative history regarding the [1988] amendment's effect on § 1400(b) does not modify this court's duty to employ the plain meaning of the language that the Congress adopted." *See VE Holdings*, 917 F.2d at 1581. Additionally, the Federal Circuit held that the "legislative history of the 1988 amendment reveals *no* legislative intent, let alone clearly expressed intent, contrary to the plain meaning of this first sentence of the amended statute." *See id.*

Ironically, the congressional reports on which the Federal Circuit relies, and goes as far as to cite, reference *VE Holding* as the justification for amending Section 1400(b) to ameliorate the harms derived from that decision's rogue interpretation. *See generally,* S.Rep. No. 110–259 (2008); *see* H.R. Rep. 114-235 (2015). Otherwise, a relationship between Section 1391(c) and 1400(b) is almost non-existent in this context. Those congressional reports go on to state that the inappropriate interpretation from *VE Holdings* (and judicial inaction) is begging for correction. One report noted that the Federal Circuit's interpretation consolidated the two-pronged jurisdictional requirements in patent litigation cases by only requiring the plaintiff to satisfy personal jurisdiction, instead of satisfying the second prong, which assesses venue as required under section 1400(b). *See* S.Rep. No. 110-259,

at 52-53. Thus, the Federal Circuit created a one-step process strongly favoring plaintiff litigants. *See id.*

C. The Federal Circuit's Decision Contradicts Well-Established Precedent Concerning Statutory Construction and Interpretation

In *Fourco*—a longstanding precedent governing over this statute, this Court reasoned that a strict interpretation of the statute was more appropriate than broadening Section 1400(b) to include Section 1391(c). *See Fourco*, at 227. This Court held that the legislative history did not support the Federal Circuit's rationale that Congress either expressly or implicitly intended the scope to be altered or augmented by Section 1390. *See id.* ("The change of arrangement, which placed portions of what was originally a single section in two separated [*sic*] sections cannot be regarded as altering the scope and purpose of the enactment. For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect, unless such intention is clearly expressed."). The Court should not adopt a view contradicting such a well-established precedent.

In ruling on this matter, the Federal Circuit essentially violated a basic rule of statutory construction: a general statute does not alter, augment, or contradict a specific statute. *See Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (holding "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."). If the lower court is upheld, the Court runs the risk of upending a cornerstone of statutory interpretation – something the Federal Circuit has already eroded. Thus,

it is imperative for the Court to get this right, because of the broader implications that fall outside the influence of patent litigation. However, the immediate implications will adversely affect small businesses holding patents from extraordinary litigation costs over venue disputes.

CONCLUSION

We urge the Court to reverse the Federal Circuit's decision, consistent with the arguments above.

Respectfully submitted,

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